In the United States Court of Appeals for the Ninth Circuit

No. 15782

ADOLPH G. HOFFMAN, Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F. KELLER and DR. F. SYDNEY HANSEN, Appellees.

BRIEF OF THE APPELLEE WAIR

Appeal from the United States District Court for the District of Oregon

Honorable William G. East, Judge

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JURISDICTION OF COURT OF APPEALS WITH RESPECT TO APPELLEE DR. DONALD E. WAIR

This is an appeal from a judgment (Tr. 18) of the United States District Court for the District of Oregon entered October 15, 1957, dismissing, as against the appellee Dr. Donald E. Wair, appellant's second amended complaint upon the ground that said complaint failed to state a claim upon which relief could be granted.

Section 1291, Title 28 U.S.C., confers jurisdiction upon this Court to review that judgment.

JURISDICTION OF UNITED STATES DISTRICT COURT WITH RESPECT TO APPELLEE DR. DONALD E. WAIR

With respect to the appellee, Dr. Donald E. Wair, appellant's second amended complaint attempted to invoke the jurisdiction of the United States District Court for the District of Oregon by setting forth alleged deprivations of appellant's civil rights occurring in connection with a hearing had on appellant's sanity in the Circuit Court for the State of Oregon, Multnomah County, which hearing resulted in appellant's confinement in the Oregon State Hospital at Pendleton, Oregon.

The appellees are alleged to have conspired:

> " * * * to deprive plaintiff of the equal protection of the laws of Oregon, to wit, the laws in relation to due and established tribunals, their organization, procedure and course of justice, and particularly those relating to the commitment of persons alleged to be mentally ill; and further conspired to deprive plaintiff of those rights provided under the Constitution and laws of the United States and particularly

those set forth in paragraph II herein, and conspired to impede, hinder, obstruct and defeat the due course and due process of law and justice in the State of Oregon; and further conspired to deprive plantiff of the rights, privileges and immunities secured by the Constitution and laws of the United States extended to citizens of the United States and particularly those set forth in paragraph II herein; that all of said acts and those set forth throughout this complaint were committed by defendants, and each of them, while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity." (§ VII of Second Amended Complaint; Tr. 4-5)

The appellee Wair's part in the aforesaid conspiracy is, by the allegations of the second amended complaint, limited to the following acts:

"1. Wilfully and intentionally forcefully restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew that defendant was being held illegally;

"2. Wilfully and intentionally forcefully restraining plaintiff from leaving the Oregon State Hospital, Pendleton, Oregon, despite the fact that he knew plaintiff was not suffering from mental illness;

"3. By suppressing the facts with regard to plaintiff's illegal detention from the proper authorties;

"4. By refusing to permit plaintiff to correspond or communicate with appropriate authorities, except to a limited extent;

"5. In threatening, coercing and intimidating plaintiff in an effort to force him to dismiss a civil action which plaintiff had filed in the Circuit Court of Multnomah County, Oregon." (§ X of Second Amended Complaint; Tr. 12-13)

Appellant alleges that as a result of the aforesaid acts of the appellee Wair and the acts of the other appelleees the appellant was confined against his will in the Eastern Oregon State Hospital from August 5, 1952, to and including October 23, 1952. (§ XI of Second Amended Complaint; Tr. 13)

To the foregoing charges the appellee Wair contended, by amended motion to dismiss (Supp. Tr. 40), that appellant's second amended complaint (1) failed to state a claim against appellee Wair upon which relief could be granted, (2) the claim alleged in said second amended complaint was barred by the applicable Oregon statute of limitations, and (3) sections 1985 and 1986 of Title 42 U.S.C. were unconstitutional and void.

Title 28 U.S.C., § 1343, confers jurisdiction to hear civil rights actions upon the United States District Courts. However, it is the position of the appellee Wair in this appeal that the court below did not have jurisdiction over the subject matter of this action against the appellee Wair because the second amended complaint failed to state a claim against the appellee Wair under the pertinent civil rights statutes, namely sections 1983, 1985 (2), (3) and 1986, Title 42 U.S.C.

STATEMENT OF THE CASE WITH RESPECT TO THE APPELLEE DR. DONALD E. WAIR

The appellee Wair was and is the Superintendent of the Eastern Oregon State Hospital (Tr. 4). As will be

pointed out later in this brief (infra 12), the appellee Wair is, with respect to his duties as such superintendent, a quasi-judicial officer with whom rests the responsibility and discretion of determining when a mental patient confined to the Eastern Oregon State Hospital is fit for release.

As to such officer the two questions in this appeal are (1) whether Congress by enactment of the civil rights statutes intended to abrogate the long-established common law immunity from tort actions attaching to quasi-judicial officers in the performance of their official duties and (2) in view of the fact that the present action was not commenced against the appellee Wair until the first amended complaint was filed on December 18, 1956 (Supp. Tr. 38), whether the Oregon two-year statute of limitations governing tort actions generally and actions for false imprisonment particularly bars the present action against the appellee Wair.

APPELLEE WAIR'S ANSWER TO APPELLANT'S SPECIFICATION OF ERROR

The District Court did not err in dismissing, as against the appellee Wair, the appellant's second amended complaint.

SUMMARY OF ARGUMENT

I

The second amended complaint fails to state a claim against the appellee Wair under sections 1983, 1985 (2), (3) and 1986, Title 42 U.S.C.

Point and Authorities 1

Congress did not intend by the adoption of the civil rights statutes to abrogate the well established common law tort immunity attaching to quasi-judicial officers in the performance of their duties.

Cawley v. Warren, 216 F. (2d) 74 (7th Cir., 1954)

Dunn v. Estes, 117 F. Supp. 146 (D. Mass., 1953)

Francis v. Crafts, 203 F. (2d) 809 (1st Cir., 1953) cert. den. 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357

Ginsburg v. Stern, 125 F. Supp. 596 (D. Pa. 1954)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. (2d) 66

Miller v. Director, Middletown State Hospital, 146 F. Supp. 674 (S.D.N.Y., 1956), affirmed 243 F. (2d) 527, cert. den. — U.S. —, 78 S.Ct. 124, 2 L.Ed. (2d) 78

Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y., 1954) affirmed 220 F. (2d) 758, cert. den. 350 U.S. 867, 76 S.Ct. 112, 110 L.Ed. 768

Ryan v. Scoggin, 245 F. (2d) 54 (10th Cir., 1957)

Tate v. Arnold, 223 F. (2d) 782 (5th Cir., 1955)

Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)

8 U.S.C., §§ 43 and 47 (3) [now 42 U.S.C. §§ 1983 and 1985 (3) respectively]

Prosser, Handbook of the Law of Torts, 2nd ed. pp. 780-784 (1955)

Point and Authorities 2

The appellee Wair, as Superintendent of the Eastern Oregon State Hospital, is a quasi-judicial officer and immune from tort liability under the civil rights statutes for any decision made in his official capacity relative to the discharge from confinement of appellant, irrespective of his motives for such decision.

Cawley v. Warren, 216 F. (2d) 74 (7th Cir., 1954)

Dunn v. Estes, 117 F. Supp. 146 (D. Mass., 1953)

Gregoire v. Biddle, 177 F. (2d) 579 (2d Cir., 1949)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 856, 77 S.Ct. 84, 1 L.Ed. (2d) 66

Miller v. Director, Middletown State Hospital, 146 F. Supp. 674 (S.D.N.Y., 1956), affirmed 243 F. (2d) 527, cert. den. — U.S. — 78 S.Ct. 124, 2 L.Ed. (2d) 78

State v. Winne, 21 N.J. Sup. 180, 91 A. (2d) 65, (1952) [reversed on other grounds, 12 N.J. 152, 96 A. (2d) 63]

Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)

§ 127-202, O.C.L.A., as amended in 1949

§ 127-216, O.C.L.A.

Point and Authorities 3

The appellee Wair, as Superintendent of the Eastern Oregon State Hospital, did not have the judicial authority to determine the validity of the order of the Oregon court committing appellant to the Eastern Oregon State Hospital.

Francis v. Lyman, 216 F. (2d) 583 (1st Cir., 1954)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 856, 77 S.Ct. 84 1 L. E. (2d) 66

Miller v. Director, Middletown State Hospital, 146 F. Supp. 674 (S.D.N.Y., 1956), affirmed 243 F. (2d) 527, cert. den. — U.S. —, 78 S.Ct. 124, 2 L.Ed. (2d) 78

42 U.S.C., § 1986

Oregon Constitution, Article III, § 1

§ 11-401, O.C.L.A.

§ 11-442, O.C.L.A.

Oregon Laws 1949, Chapter 571, section 4

II

The claim alleged against the appellee, Dr. Donald E. Wair, is barred by the applicable Oregon statute of limitations.

Point and Authorities 1

Appellant's claim against the appellee Wair is governed by the Oregon statute of limitations.

Kenney v. Killian, 133 F. Supp. 571 (D. Mich., 1955) affirmed 232 F. (2d) 288, cert. den. 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. (2d) 66

O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914)

Wilson v. Hinman, 172 F. (2d) 914 (10th Cir., 1949), cert. den. 336 U.S. 970, 69 S.Ct. 933, 93 L.Ed. 1121; reh. den. 337 U.S. 927, 69 S.Ct. 1164, 93 L.Ed. 1734, reh. den. 338 U.S. 953, 70 S.Ct. 478, 94 L.Ed. 588

42 U.S.C., §§ 1987, 1988

Point and Authorities 2

The gist of appellant's action against the appellee Wair is for the tort of false imprisonment, which is governed by the two-year limitation statute and hence appellant's claim against the appellee Wair is barred.

Francis v. Lyman, 108 F. Supp. 884 (D. Mass., 1952)

Gordon v. Garrson, 77 F. Supp. 477 (D. Ill., 1948)

Kenney v. Killian, 133 F. Supp. 571 (D. Mich., 1955) affirmed 232 F. (2d) 288, cert. den. 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. (2d) 66

Lane v. Ball, 83 Or. 404, 160 P. 144, 163 P. 975 (1917)

Steiner v. 20th Century-Fox Film Corp., 232 F. (2d) 190, (9th Cir., 1956)

ORS 12.010

ORS 12.110

ARGUMENT

I

(Point 1)

The principle that certain classes of defendants are immune from liability for their acts is, of course, an old one. At common law such immunity was enjoyed by legislators, judges and certain officers who, although they were not judges, did perform judicial functions, so-called quasi-judicial officers: Prosser, Handbook of the Law of Torts, 2nd Edition, pp. 780-784 (1955).

The application of the principle of immunity, however, to actions arising under the civil rights statutes is comparatively recent. The leading case on the subject is *Tenney v. Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). In that case the plaintiff had been summoned to appear as a witness before the Un-American Activities Committee of the California Senate because of a conflict between previous testimony of the plaintiff before the committee and subsequent statements made by the plaintiff in a petition circulated by the plaintiff to the legislature not to appropriate further funds for the committee. The plaintiff refused to testify at the later hearing and was prosecuted for contempt. Plaintiff thereafter sued the members of the committee for damages under 8 U.S.C. § 43 and 47 (3) [now 42 U.S.C. § 1983

and 1985 (3), respectively] alleging the deprivation of his civil rights under those provisions.

The Supreme Court affirmed the judgment of the District Court which had dismissed the complaint. The grounds of that holding were (1) the defendants were acting within the sphere of customary legislative activity and therefore (2) enjoyed the common law immunity from tort liability attaching to legislators for their official acts which immunity (3) Congress had not intended to abrogate by the adoption of the civil rights statutes.

The court's comments about the allegations of malice and the like in such cases is significant:

> *"The claim of an unworthy purpose does not destroy the privilege.* Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. *The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or to the hazard of a judgment based upon a jury's speculation as to motives.* * * *" (Emphasis supplied) (95 L.Ed. 1027)

While the Tenney case dealt with legislative immunity from tort liability, subsequent cases arising under the civil rights statutes have applied the principle of immunity from tort liability to judges:[1] *Francis v. Crafts,* 203 F. (2d) 809 (1st Cir., 1953), cert. den. 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357; *Morgan v. Sylvester,* 125 F.

Supp. 380 (S.D.N.Y., 1954) affirmed 220 F. (2d) 758, cert. den., 350 U.S. 867, 76 S.Ct. 112, 110 L.Ed. 768; *Tate v. Arnold,* 223 F. (2d) 782 (5th Cir., 1955); *Ginsburg v. Stern,* 125 F. Supp. 596, 600-601 (D. Pa., 1954); *Kenney v. Fox,* 232 F. (2d) 288 (6th Cir., 1956) cert. den. 352 U.S. 855, 856, 77 S.Ct. 84, 1 L.Ed. (2d) 66 (Appendix 26); *Ryan v. Scoggin,* 245 F. (2d) 54 (10th Cir., 1957) and to persons who, although they are not judicial officers, do perform judicial acts—so-called quasi-judical[2] officers: *Miller v. Director,* Middletown State Hospital, 146 F. Supp. 674 (S.D.N.Y., 1956), affirmed 243 F. (2d) 527, cert. den. — U.S. —, 78 S.Ct. 124, 2 L.Ed. (2d) 78 [State Hospital Director] (Appendix 27); *Dunn v. Estes,* 117 F. Supp. 146 (D. Mass., 1953) [probation officer]; *Kenney v. Fox,* supra, [prosecuting attorney]; *Cawley v. Warren,* 216 F. (2d) 74 (7th Cir., 1954) [prosecuting attorney, foreman of grand jury].

(Point 2)

With the foregoing principles in mind we turn to the appelle Wair. Appellant was confined in the Eastern Oregon State Hospital from August 5, 1952, to October 23, 1952 (§ XI, Second Amended Complaint, Tr. 13). At that time the appellee Wair was the Superintendent of that hospital (Tr. 4). As such it was his duty to "discharge such patients as, in his opinion, [were] * * * properly fit to be discharged: § 127-202, O.C.L.A.,[3] as

amended by section 5, Chapter, 549, Oregon Laws 1949 (Appendix 20). Or, as more fully stated in § 127-216, O.C.L.A. (Appendix 21), the appellant Wair, as Superintendent of the Eastern Oregon State Hospital could discharge a patient "who, in his judgment, [had] * * * recovered" or "who [had] * * * not recovered but whose discharge, in the judgment of the superintendent [would] * * * not be detrimental to the public welfare, or injurious to the patient," provided that in either case "the superintendent [should] * * * satisfy himself by sufficient proof that the friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge.

It is clear from the above statutes that with respect to the determination by the superintendent of either the length of confinement of a mental patient or the time when a patient can be safely discharged, the superintendent performs a quasi-judicial duty:

> "Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, it is generally deemed 'quasi-judicial' * * *." *State v. Winne,* 21 N.J. Sup. 180, 91 A. (2d) 65, 74 (1952) [reversed on other grounds, 12 N.J. 152, 96 A. (2d) 63].

By contrast, a ministerial[4] duty is one that requires no judgment or discretion as to the time or manner of its execution: *State v. Winne,* supra (Appendix 28).

In this case the gist of appellant's claim against the appellee is simply that although appellee allegedly knew appellant was illegally confined and sane, appellee persisted in holding appellant in the hospital (§ X, Second Amended Complaint; Tr. 12-13). However, it was solely within the discretion and judgment of the appellee Wair, when appellant should have been released: §§ 127-202 and 127-216, O.C.L.A., supra. And even if appellee maliciously exercised this discretion under the cited provisions, nevertheless the appellee is immune from civil liability to appellant under the civil rights statutes: *Tenney v. Brandhove, Cawley v. Warren, Dunn v. Estes, Kenney v. Fox* (Appendix 26), *Miller v. Director,* Middletown State Hospital (Appendix 27), all supra.

The policy basis for this rule is sound—public officers exercising discretionary powers cannot exercise those powers primarily in the public interest if the threat of civil reprisal by private litigants for their decisions hangs constantly over their heads. The law, therefore, with respect to the acts or determinations of public officers within the scope of their duties, grants tort immunity to all such officers, honest or malicious, in order to encourage an exercise of discretion uninfluenced by motives other than that which the public good demands: *Gregoire v. Biddle,* 177 F. (2d) 579, 580-581 (2nd Cir., 1949) [Appendix 24].

(Point 3)

Appellant also attempts to state a claim against the appellee Wair by alleging that the appellee Wair continued to hold appellant "despite the fact he knew that defendant was being held illegally" (§ X, Second Amended Complaint; Tr. 13). Under the separation of powers principle, however, the appellee Wair as an administrative officer clearly had no judicial authority to determine the validity of the commitment order (Section 4, Chapter 571, Oregon Laws 1949, provides for a commitment order; see Appendix 20) under which he held the appellant: Article III, section 1, Oregon Constitution (Appendix 19). That determination, if it were to be made, was, of course, the function of the Circuit Court of Umatilla County at Pendleton, Oregon, sitting in habeas corpus: §§ 11-401 and 11-442, O.C.L.A. (Appendix 22, 23). And the federal courts in civil rights cases have agreed that state officers holding persons under judicial process need not make a determination of the validity of that process: *Francis v. Lyman,* 216 F. (2d) 585, 588 (1st Cir., 1954) (Appendix 23); *Kenney v. Fox,* supra, p. 290 (Appendix 26); *Miller v. Director* of Middletown State Hospital, supra, pp. 677-678 (Appendix 27).

II

(Point 1)

Sections 1981 through 1988, Title 42 U.S.C., under which the appellant purports to bring his action do not

contain any provision governing the period within which civil rights actions may be brought. The rule is therefore unanimous that the applicable state statute of limitations controls in determining whether a civil rights action has been commenced in time or not: *O'Sullivan v. Felix,* 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914); *Wilson v. Hinman,* 172 F. (2d) 914 (10th Cir., 1949), cert. den. 336 U.S. 970, 69 S.Ct. 933, 93 L.Ed. 1121; reh. den. 337 U.S. 927, 69 S.Ct. 1164, 93 L.Ed. 1734, reh. den. 338 U.S. 953, 70 S.Ct. 478, 94 L.Ed. 588; *Kenney v. Killian,* 133 F. Supp. 471 (D. Mich., 1955), affirmed sub. nom. *Kenney v. Fox,* supra.

(Point 2)

We turn again to the facts of this case. Appellant alleges that he was confined in the Eastern Oregon State Hospital "from on or about the 5th day of August, 1952, to and including on or about the 23rd day of October, 1952." (§ XI, Second Amended Complaint; Tr. 13).

Since the gist of appellant's action is the alleged fact that he was illegally confined in the Eastern Oregon State Hospital without due process or equal protection of the law, it is clear that his purported claim against the appellee Wair finally "accrued" at the end of that confinement on October 23, 1952: ORS 12.010 (Appendix 22); *Lane v. Ball,* 83 Or. 404, 412, 160 P. 144, 163

P. 975 (1917); *Francis v. Lyman,* 108 F. Supp. 884 (D. Mass., 1952) affirmed sub nom *Francis v. Crafts,* supra.

So far as the appellee Wair is concerned, the appellant's action sounds in tort for false imprisonment (see § X, Second Amended Complaint; Tr. 12-13). The Oregon statute of limitations governing such actions is ORS 12.110. (Appendix 22). The limitation period provided in that statute is two years, the result being that the action against the appellee Wair was required to be brought within two years after the cause of action "accrued," more particularly, by on or about October 23, 1954: ORS 12.010, supra; *Lane v. Ball,* supra; *Francis v. Lyman,* supra.

As against the appellee Wair, however, the civil action which is the subject of this appeal (Number 7351 in the United States District Court) was not commenced at least until December 18, 1956, when the amended complaint was filed (Supp. Tr. 38)[5]. The original complaint in civil action No. 7351 did not include the appellee Wair as a party (Supp. Tr. 27). The result is that the action against the appellee Wair was not brought until more than four years had elapsed after the accrual of the appellant's alleged claim against him. As against the appellee Wair, therefore, appellant's action is barred: *Kenney v. Killian,* supra; Accord *Gordon v. Garrson,* 77 F. Supp. 477, 480 (D. Ill., 1948)

Doubtless it will be argued that since the conspiracy

is alleged to have continued up to and including June 18, 1956 (Tr. 4), that the action is not barred. That allegation, however, is a mere conclusion of law in view of the fact that the alleged result of that conspiracy was the alleged illegal confinement in the hospital from August 5, 1952, to October 23, 1952 (§ XI, Amended Complaint; Tr. 13). Accord *Steiner v. 20th Century-Fox Film Corp.*, 232 F. (2d) 190, 194, (9th Cir., 1956)

It follows from the foregoing, therefore, that appellant's action against the appellee Wair is barred by the two-year Oregon statute of limitations: *Kenney v. Killian*, supra.

CONCLUSION

For the reasons advanced, the appellee, Dr. Donald E. Wair, submits that the judgment of the court below dismissing the appellant's action against him should be affirmed.

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APPENDIX

Notes

Note 1

McShane v. Moldovan, 172 F. (2d) 1016 (6th Cir., 1949) [App. Tr. 25] was decided prior to *Tenney v. Brandhove,* supra. To the extent that that case can be said to be contra to the doctrine of the immunity of judicial officers, it has been overruled by *Kenney v. Fox,* supra, p. 293.

Likewise, the case of *Picking v. Pennsylvania R. Co.,* 151 F. (2d) 240 (3 Cir., 1945) [App. Br. 26] was decided prior to *Tenney v. Brandhove* and appears to be contra to the immunity principles advanced herein. The correctness of the decision in that case, however, has been questioned by a great many courts, e.g., *Francis v. Crafts,* supra, 811, 812, *Kenney v. Fox,* supra, p. 293, including the District Court of the same circuit, *Ginsburg v. Stern,* supra, pp. 600-601.

Cooper v. Hutchinson, 184 F. (2d) 119 (3rd Cir., 1950) [App. Br. 32] did not involve the immunity principle since that case was for injunctive relief, not for damages.

Note 2

At first glance, *Lewis v. Brautigan,* 227 F. (2d) 124 (5th Cir., 1955) [App. Br. 22] appears to hold that a quasi-judicial officer (the State's prosecuting attorney) is not immune from tort liability in an action under the civil rights statutes. The court, however, recognized the principle but held that under the facts of that case it was inapplicable to the prosecuting attorney, that officer having acted "outside the scope of his jurisdiction," by coercing a plea of guilty from a criminal defendant.

In that case, of course, the prosecuting attorney, in coercing a plea of guilty, was acting entirely outside the scope of his duties.

In this case, so far as the appellee Wair is concerned, his determination of appellant's release date as Superin-

tendent of the hospital was entirely within the scope of his duties.

Note 3

The Oregon Revised Statutes did not go into effect until December 31, 1953. In view of the fact that plaintiff's purported cause of action accrued in 1952, the official Oregon compilation in effect at that time is, in general, cited throughout this brief, namely: the Oregon Compiled Laws Annotated.

Note 4

A number of the cases cited by appellant where liability was imposed under the civil rights statutes involved ministerial officers: e.g.,*Davis v. Turner,* 197 F. (2d) 847 (5th Cir., 1952) [Sheriff and deputy sheriff]; *Geach v. Moynahan,* 207 F. (2d) 714 (7th Cir., 1953) [police officers]; *State of Arkansas v. Central Surety & Ins. Corp.,* 102 F. Supp. 444 (D. Ark., 1952) [police officers].

Note 5

The appellee Wair was a party defendant in another action against him and others, that action being Civil No. 7352 in the United States District Court.

CONSTITUTION AND STATUTES

Oregon Constitution, Article III, Section 1

The powers of the Government shall be divided into three seperate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Oregon Laws 1949, Ch. 549, section 5

That section 127-202, O.C.L.A., as amended by section 2, chapter 43, Oregon Laws 1947, be and the same hereby is amended so as to read as follows:

Sec. 127-202. The eastern Oregon state hospital, situate in the city of Pendleton, county of Umatilla, shall be used as an asylum for such mentally diseased persons as have been or may hereafter be committed to its care and custody. So far as can practicably be done with existing facilities and facilities hereafter constructed and maintained, those patients who have developed mental enfeeblement shall be segregated from and cared for in accommodations separate and apart from the mentally diseased patients. The superintendent of said hospital shall be a well educated physician licensed by the state board of medical examiners to practice medicine and surgery, and shall appoint an assistant superintendent and all other necessary physicians and medical assistants, who shall receive such salaries as the Oregon state board of control may authorize, within the appropriation therefor and limitations prescribed by law, all of whom shall reside at or near the hospital and shall be furnished residences or housekeeping rooms, also household furniture, provisions, fuel and light, at such rates of payment therefor as the board of control from time to time may prescribe. The assistant superintendent shall be a well educated physician licensed by the state board of medical examiners to practice medicine and surgery. *The superintendent shall, from time to time, discharge such patients as, in his opinion, are properly fit to be discharged.* (Emphasis supplied)

Oregon Laws 1949, Ch. 571, section 4

The physicians appointed shall examine such person as to his mental condition and report their separate or joint findings in writing, under oath, to the court, which findings immediately shall be filed with the clerk of the

court. Should said examining physicians find, and show by their verified findings, that the person examined is mentally ill and by reason of mental illness is in need of treatment, care or custody, and should the judge, after having examined said verified findings and considered all competent evidence submitted to him, be of the opinion that such person is in need of treatment, care or custody, *he shall adjudge such person to be mentally ill and order him committed to the proper state hospital;* provided, that if the legal guardian, relative or friend of said mentally ill person request that he be allowed to care for him in a place satisfactory to the judge, and show that he, such applicant, is competent and financially able to care for such mentally ill person, and also if it appear to the court that such mentally ill person is not criminally inclined or violent, and that proper care and treatment can and will be provided him by such applicant, and that it would be to the best interest of such mentally ill person to be paroled, the judge may, in his discretion, order and direct that said mentally ill person be released and placed in the care and custody of such legal guardian, relative or friend making such application, but such order may be revoked and said mentally ill person committed to an Oregon state hospital whenever, in the opinion of the judge, it is for the best interest of such mentally ill person. Emphasis supplied)

§ 127-216 O.C.L.A.

The superintendent of any state hospital wherein are confined persons adjudged to be insane may, by filing his written certificate with the state board of control, discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal offense, at any time as follows:

(1) A patient who, in his judgment, is recovered.
(2) A patient who, in his opinion, is a dotard and not insane.
(3) Any patient who is not recovered but whose

discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient; provided, however, that before making such certificate, the superintendent shall satisfy himself by sufficient proof, that the friends or relatives of the patient are willing and financially able to receive and properly care for such patient after his discharge.

ORS 12.010

Actions at law shall only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited shall only be taken by answer, except as provided in ORS 16.260

ORS 12.110

(1) An action for assault, battery, false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit.

(2) An action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two years.

§ 11-401, O.C.L.A.

The writ of habeas corpus and subjiciendum is the writ herein designated, and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of his liberty, within this state, under

any pretense whatsoever except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.

§ 11-442, O.C.L.A.

The circuit court of the judicial district wherein the party is imprisoned or restrained, and the county court and the county judge of each of the several counties of this state wherein the party is imprisoned or restrained, shall have concurrent jurisdiction of the proceedings by habeas corpus herein provided for, and the said courts and judges thereof may issue, hear, and decide all questions arising upon habeas corpus. At any time after the allowance of such writ or warrant, by the court or judge thereof, the plaintiff therein, or the person applying therefor on his behalf, may give notice to the judge issuing the same, and thereupon, if necessary to avoid delay, such judge shall by order require that the return be made and the party produced before him at such time and place, within the county or district, as may be convenient.

CASES

Francis v. Lyman, 216 F. (2d) 583, page 585, 586

"None of these defendants, former Commissioners of Correction, caused the confinement of Francis in denial of his right to due process of law. It is true they failed to order his release; but this was nonfeasance in a situation where the Commissioner had neither the legal duty nor the legal authority to act. *The proper procedure for inquiring into the lawfulness of Francis' confinement was by application to a court for a writ of habeas corpus.* * * *

* * *

"Naturally, the refusal of these defendants to release Francis on parole resulted in the continuance of his

confinement as theretofore. But these defendants were not the legal cause of the continuous confinement of Francis pursuant to the original order of commitment. As in the case of the former Commissioners of Correction, *the failure of the members of the Parole Board to order the release of Francis on the ground that he had been committed in defiance of his constitutional rights was mere nonfeasance in a situation wherein the Parole Board had neither the legal duty nor the legal authority to act. The Parole Board had no function to go behind the commitment order issued by Judge Crafts and to inquire into the original lawfulness of the confinement.* It had the function of considering applications by a prisoner for release on parole, and of granting such applications if satisfied that the prisoner was a fit subject for parole under the conditions laid down by law. * * *" (Emphasis supplied)

Gregoire v. Biddle, 177 F. (2d) 579, 580-581 (2nd Cir., 1949)

" * * * we think that the complaint should not stand, even though under Rule 9(b) we read the allegation that the defendants arrested the plaintiff 'maliciously and wilfully,' as though it had specifically alleged that they had acted altogether from personal spite and had been fully aware that they had no legal warrant for arresting or deporting the plaintiff. True, so stated, that seems at first blush a startling proposition; but we think, not only that it necessarily follows from the decision of the Supreme Court in *Yaselli v. Goff;* but that, as a new question, the result is desirable. * * *

"We discussed at length the absolute privilege of judges, and held that a United States attorney 'if not a judicial officer, is at least a quasi-judicial officer, of the government,' and that as such the defendant 'in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution. * * * *The immunity is absolute and is grounded on principles of public policy. The public interest re-*

*quires that persons occupying such important positions and so closely identified with the judicial departments of the Government should speak and act freely and fearlessly in the discharge of their important official functions.' * * **

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. *The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.* There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. *In this instance is has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.* Judged as res nova, we should not hesitate to follow the path laid down in the books.

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and *it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A*

moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. For the foregoing reasons it was proper to dismiss the first count." (Emphasis supplied)

Kenney v. Fox, 232 F. (2d) 288 (6th Cir., 1956) page 290

"We agree also with the reasoning of the district judge concerning the non-liability of the two doctors. As stated in his opinion, the institutional doctors should not be expected or even permitted to go behind a court order of commitment of a person to a state mental hospital where, on its face, the order appears to be valid. * * * * * *

"In No. 12,619, the appellant, Edward James Kenney, Jr., brought an action based upon the civil rights statute, 42 U.S.C.A. § 1983, against Joseph E. Killian, prosecuting attorney of Berrien County, Michigan, for alleged false imprisonment and malicious prosecution upon allegations that the defendant official caused the plaintiff to be confined in a county jail for about forty hours, in violation of his claimed civil rights. The district court held that the action was barred by the Michigan two-year statute of limitations; that the complaint failed to state a claim upon which relief could be granted; and that the defendant was immune from civil liability to the plaintiff under the civil rights statute. District Judge Starr wrote a full-dress opinion, *Kenney v. Killian,* D.C., 133 F. Supp. 571, in which he set forth the facts, in view of which we consider it unnecessary to restate them here.

"We pretermit decision upon whether Kenney's action is barred by the statute of limitations, but uphold the dismissal of the suit upon the basis of no cause of action. We think the district judge has supplied in his

opinion compelling reasons for his dismissal of Kenney's action against the prosecuting attorney, who was acting in his official capacity in connection with all actions of which appellant complains. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation. *Yaselli v. Goff*, 2 Cir., 12 F.2d 396, 404, 56 A.L.R. 1239; *Cawley v. Warren*, 7 Cir., 216 F. 2d 74, 76; *Laughlin v. Rosenman*, 82 U.S. App. D.C. 164, 163 F.2d 838."

* * *

"'* * * The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.' 13 Wall. 354, 80 U.S. 354."

Miller v. Director, Middletown State Hospital

146 F. Supp. 674 (S.D.N.Y., 1956) page 677-678

" * * * It is not necessary, however, to determine whether the allegations in the complaint are sufficient to satisfy the essential elements of an action under that Act, since even if they are, the defendant would still be immune from liability. It now appears to be well settled that the Civil Rights Act did not abolish some of the well-established common law immunities such as those for legislators, judges and persons in other quasi-judicial

positions. *To the extent that the director was called upon to exercise discretion in determining when the plaintiff should be discharged, he was exercising a quasi-judicial role and is therefore immune. To the extent that he was merely executing the order of the State Supreme Court justice his immunity is equally clear.* It would certainly be paradoxical to grant immunity to the judge entering the order and yet impose liability on those executing it." (Emphasis supplied)

State v. Winne, 21 N.J. Supp. 180, 91 A. (2d) 65, 74 (1952)

" * * * In contrast it is said that an official duty is 'ministerial' when it is absolutely certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action is ministerial when it is the result of performing a certain and specific duty arising from fixed and designated facts. A ministerial act is one which a public officer is required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. *Garff v. Smith,* 31 Utah 102, 86 p. 772, 120 Am.St.Rep. 924 (Sup.Ct.Utah 1906); *People v. Bartels,* 138 Ill. 322, 27 N.E. 1091 (Sup. Ct.Ill.1891); *State v. Meier,* 143 Mo. 439, 45 S.W. 306 (Sup.Ct.Mo. 1898)."